BOARD OF PARDONS AND PAROLE

BRIAN SCHWEITZER, GOVERNOR
CRAIG THOMAS
EXECUTIVE DIRECTOR

STATE OF MONTANA

(406) 846-1404
FAX (406) 846-3512
bopp@mt.gov

300 MARYLAND AVENUE
DEER LODGE, MONTANA 59722

FOR IMMEDIATE RELEASE

DATE: Thursday, Aug. 23, 2007

The state Board of Pardons and Parole has unanimously declined to make a recommendation to the Governor for an order of Clemency for either Commutation or Pardon for convicted murderer Barry Beach.

In a 20 page decision released Thursday, the board explained its decisions to not recommend Gov. Brian Schweitzer grant any form of Executive Clemency to Beach. The decision came following four days of hearings. The board conducted a three-day hearing in June on Beach's petition for a Pardon and a one-day hearing Aug. 1 on his request for a Commutation of his sentence.

Beach, 45, has been in prison for 23 years for the 1979 murder of Kim Nees in Poplar. He is serving a 100-year sentence.

The board's decision by members Vance Curtiss, Teresa McCann O'Connor and Margaret Hall Bowman cannot be appealed.

"This was a difficult and involved case with extensive testimony and filings," said Chairman Curtiss. "The board members carefully reviewed all the information and listened intently to witnesses before reaching our conclusions."

Board members and their staff declined to comment on the rulings, saying the written document containing detailed conclusions and findings of fact speaks for itself.

State of Montana
Board of Pardons and Parole

In the Matter of the Application
for Executive Clemency for Pardon
and Commutation of the Sentence
of Barry Alan Beach

DECISION

The Montana Board of Pardons and Parole, by and through the undersigned members, hereby renders its unanimous decision with regard to the clemency for pardon and commutation requests of Barry Beach.

Barry Beach was convicted, in the Fifteenth Judicial District Court for Roosevelt County, on April 13, 1984, of the offense of deliberate homicide for the murder of Kimberly Nees in Poplar, Montana on or about June 16, 1979. Trial counsel were Charles "Timer" Moses for Mr. Beach and then Assistant Attorney General Marc Racicot for the State of Montana. The trial was held in Glasgow, Montana, pursuant to a request for change of venue by counsel for Mr. Beach. Mr. Beach confessed to authorities in the state of Louisiana in January 1983. The confession is attached hereto as Appendix A. There was also a pre-trial motion to suppress the confession, hearing for which was held on February 24, 1984. The motion to suppress was denied on March 29, 1984; the confession was not suppressed, and it was admitted at trial. The murder occurred when Mr. Beach was seventeen years of age, and the confession was obtained when he was just short of 21 years of age. Mr. Beach was sentenced, by the Honorable M. James Sorte, to a term of 100 years at the Montana State Prison with no possibility of parole. Application to the Sentence Review Division of the Supreme Court was made, and on May 11, 1984, they handed down their decision that the sentence would remain as it had been imposed. There was a timely appeal to the Montana Supreme Court where the conviction and

sentence were affirmed at 217 Mont. 132, 705 P.2d 94 (1985) decided July 25. 1985; rehearing was requested and was denied on August 27, 1985. There was a Petition for Habeas Corpus filed in the Federal District Court for the District of Montana on April 7, 1992. It was determined that state remedies had not been exhausted, because no post conviction relief outside of the five year time had been requested; and an indefinite stay was granted by the United States District Court Judge Jack D. Shanstrom on September 28, 1993. A request for post conviction relief to exhaust state remedies was not filed with the Montana Supreme Court until two years after the stay on October 30, 1995 and was denied on all counts, by way of granting a motion to dismiss it, on February 8. 1996 at 275 Mont. 370, 913 P.2d 622 (1996). Ultimately, it was the Recommendation of the United States Magistrate Richard W. Anderson, issued with an extensive and thorough decision evidencing a careful review, that the Petition for Habeas Corpus be denied; that Recommendation issued on August 5, 1997. Counsel for Mr. Beach filed objections to the Recommendation; the matter was reconsidered by Chief United States District Judge Jack D. Shanstrom who issued his Order denying Habeas Corpus on March 31, 1998. There was an appeal of the Montana federal decision on Habeas Corpus to the Ninth Circuit Court of Appeals filed in 1998; the Ninth Circuit denied the claim of Habeas Corpus by affirming the Montana Federal District Court decision on August 9. 1999, and that decision was filed on August 30. 1999.

Mr. Beach has been imprisoned in the State of Montana since 1984. He filed requests for a clemency hearing in 1994 and 2005, both of which were denied.

In November of 2006, the Board of Pardons and Parole granted the request for a Clemency hearing pursuant to Title 46, Chapter 23, Part 3, Montana Code Annotated, Section 301 of which is as follows:

> **46-23-301. Cases of executive clemency -- application for clemency -- definitions.** (1) (a) "Clemency" means kindness, mercy, or leniency that may be exercised by the governor toward a convicted person. The governor may grant clemency in the form of:
> (i) the remission of fines or forfeitures;

(ii) the commutation of a sentence to one that is less severe;
(iii) respite; or
(iv) pardon.
(b) "Pardon" means a declaration of record that an individual is to be relieved of all legal consequences of a prior conviction.
(2) A person convicted of a crime need not exhaust judicial or administrative remedies before filing an application for clemency, except that an application may not be filed with respect to a sentence of death while an automatic review proceeding is pending before the Montana supreme court under 46-18-307 through 46-18-310. The board shall consider cases of executive clemency only upon application. All applications for executive clemency must be made to the board. An application for executive clemency in capital cases may be filed with the board no later than 10 days after the district court sets a date of execution. Applications may be filed only by the person convicted of the crime, by the person's attorney acting on the person's behalf and with the person's consent, or by a court-appointed next friend, guardian, or conservator acting on the person's behalf. The board shall cause an investigation to be made of and base any recommendation it makes on:
(a) all the circumstances surrounding the crime for which the applicant was convicted; and
(b) the individual circumstances relating to social conditions of the applicant prior to commission of the crime, at the time the offense was committed, and at the time of the application for clemency.
(3) The board shall advise the governor and recommend action to be taken. The board may recommend that clemency be granted or denied. In noncapital cases, if the board recommends that clemency be denied, the application may not be forwarded to the governor and the governor may not take action on the case. In capital cases, the board shall transmit the application and either a recommendation that clemency be granted or a recommendation that clemency be denied to the governor. The governor is not bound by any recommendation of the board, but the governor shall review the record of the hearing and the board's recommendation before granting or denying clemency. The governor has the final authority to grant or deny clemency in those cases forwarded to the governor. An appeal may not be taken from the governor's decision to grant or deny clemency.

Montana Administrative Rules at 20.25.901 set forth the application procedure as follows:

(1) Application forms for executive clemency may be obtained at the Board of Pardons and Parole, 300 Maryland Avenue, Deer Lodge, Montana 59722.
(2) Applications must be in writing, signed by the qualified applicant and filed with the executive director of the board of pardons and parole.

> Applications may be filed only by the person convicted of the crime, by the person's attorney acting on the person's behalf and with his/her consent, or by a court-appointed next friend, guardian, or conservator acting on the person's behalf.
> (3) The applications shall state the type of executive clemency requested, the particulars of the crime, giving dates of commission, the court of conviction, the circumstances relating to the social condition of the applicant and the reasons for the request for executive clemency. Unless the board otherwise orders or there has been a substantial change in circumstances, as determined by the board, a person may not reapply for executive clemency for a period of 36 months.
> (4) In capital cases, the application for executive clemency must be received by the board at least 30 days prior to the date of execution. The board may waive the 30-day requirement for good cause shown.

Montana Administrative Rules at 20.25.902 set forth the criteria as follows:

> 5) Executive clemency may be recommended for an individual who:
> (a) Can satisfactorily prove innocence of a crime for which the person is serving or has served time;
>
> (b) Has demonstrated exemplary performance;
>
> (c) Submits newly discovered evidence showing complete justification or non-guilt on the part of the person;
>
> (d) Suffers from terminal illness or from a chronic disability;
>
> (e) Can satisfactorily prove that further incarceration would be grossly unfair;
>
> (f) Can satisfactorily prove that a death penalty should be avoided; or
>
> (g) Can satisfactorily prove extraordinary mitigating or extenuating circumstances exist.

The standard for the granting of a request for a clemency hearing in a case such as this is prefaced on a notion that either proof of innocence, or newly discovered evidence of non-guilt or justification will be presented. The Board wants to make clear that new evidence is just that-- new evidence. New evidence is not constituted when evidence known at the time of the original trial or at the time of other proceedings was known and either was not judged to be credible or was not presented for strategic reasons. A clemency hearing is not "another crack at it"-- in hopes that arguments previously made unsuccessfully will now fall on more responsive ears; nor is it a chance to re-think

trial strategy in hopes that some matters not presented to a jury, if they were presented to the Parole Board, would turn things around and cause a *de facto* reversal of a jury verdict and all of the appellate proceedings which followed. In this matter, upon the representation from Centurion Ministries for Barry Beach and appearance that such new evidence would be forthcoming, the opportunity for the hearing was granted.

This hearing was also granted because of the far flung requests from people in the Poplar, Roosevelt County area who had heard so many rumors, both from the time of the murder itself, throughout the protracted time the murder went unsolved, and rising to fever pitch during the most recent more than five years during which Centurion Ministries representatives returned more than thirty times to the rural reservation area, repeatedly interviewing the same people, in an widely announced search for what they described as "the real killer," that someone get to the bottom of all of the aspersions cast in every direction. It is noted that, despite all protestations by Centurion Ministries of the unreliability of law enforcement reports of the unrecorded interviews of Mr. Beach, recordings of these multiple contacts have never been presented, and memorialization of the statements was not received until specifically requested by the Board in the year of this hearing, 2007. All interested parties should be assured that, though none of the undersigned Board members can claim infallibility, they have taken their responsibilities seriously and have read the files-- reams and reams of the historical record and the new files containing all that was substantiated and all that was unsubstantiated and prepared by each side-- and have done the most thorough consideration and deliberation in their power in handing down these determinations.

Two telephonic pre-hearings were held with the Board members and counsel for both Centurion Ministries on behalf of Barry Beach and the Montana Attorney General's office. Expectations by the Board that both parties fully utilize the subpoena power of the Board and the issuance of an order of a continuance so that those powers could be utilized in a timely manner most likely to effect compliance

were made clear; the purpose was to provide the opportunity for direct testimony and direct declarations before conflicting hearsay was heard in an effort most exhaustively and responsibly to examine every last possible question in this matter, and, insofar as it may be possible, to lay these inquiries to their final rest. The hearing was bifurcated into a first portion, held on June 14-16, 2007 at the Montana State Prison on the issue of whether new evidence indicating innocence rose to such a level as to indicate a recommendation to the Governor to grant pardon to Mr. Beach. The second portion was held on August 1, 2007 at the Community Center in Deer Lodge on the subject of whether information received, together in context with all surrounding circumstances known to the Board, rose to such a level as to indicate a recommendation to the Governor to grant a commutation of the original sentence, likely envisioning an amendment of the no parole provision to allow parole for which Mr. Beach could be made eligible at this point. Mr. Beach was present throughout as were Robert McClosky and Peter Camiel for Centurion Ministries, representing him; and Assistant Attorneys General, Micheal S. Wellenstein and Tammy K. Plubell were also present at both portions of the hearing representing the State of Montana.

During the entire hearing, latitude allowed both parties was extraordinarily expansive. This latitude, while not seen by this Board as precedential, was afforded for the same reasons as those which caused the conduct of the hearing itself. Both parties were allowed to present information which clearly would not have been allowed in a court of law. Hearsay-- and double and triple hearsay-- was heard, despite all requests of the Board to preface it with the direct testimony first. Also, the Board has considered all of the additional information put before it by both parties, whether or not that information was actually introduced at the hearing. Investigation into "all facts and circumstances surrounding the crime" was given its widest possible interpretation.

As to the crime scene, much was argued by Centurion Ministries about there being "no evidence" connecting Mr. Beach to the crime scene. That is simply not true. Mr. Beach was connected

in a host of ways, through his confession-- he gave a statement which provided explanations not previously understood by investigators, and even at odds with what their theory was, but consistently in keeping with the actual physical evidence. This is evidence, at least as compelling as fingerprints could possibly have been. Except for the color of clothing Kimberly Nees wore, nothing from the confession conflicted with the actual crime scene. Several things were explained by the confession that had never been explained before; and, even more compellingly, several of the explanations were in conflict with the law enforcement officers' theory of the case but completely in keeping with the actual physical evidence from the crime scene-- belying the theory that officers so successfully led Mr. Beach through his confession as to create a false confession. It is apparent to us that it would have been impossible to create so detailed and so correct a false confession in any event; but the validity of that observation is underscored brightly by the facts that Mr. Beach knew and explained much which the officers had not been able to piece together.

As to the likelihood that there were other perpetrators, amorphous statements were offered that various people said that they knew more of the story or that they knew that the wrong man was in prison. It may well be that these statements were made, even though, insofar as the direct declarants were brought before us, they denied making those statements; and the others, had they been brought, could have been expected to testify in much the same manner. Regardless of whether the statements were made, however, no evidence whatever corroborating those statements or correlating them to the actual murder was brought or was even claimed ever to have existed (except in a "who knows what might have been?" sort of way). Unlike the crime scene which corroborated Mr. Beach's statement, while perhaps not absolutely perfectly but in supreme detail, the crime scene did not in any way corroborate any of the other theories of this case brought before the Board or any other tribunal across all these years. It was publicly known that a crescent wrench was used in the murder; but it was also true that not all of the wounds could have been inflicted by use of a crescent wrench. Not until Mr.

Beach said that a tire iron was also used was that possibility explored. Dr. Pfaff's testimony at trial was that neither a crescent wrench alone nor a tire iron alone could have inflicted all of the wounds that killed Kimberly Nees, but that use of both of them could have inflicted all of the wounds. Mr. Beach's description of how he put Kimberly Nees' body in a garbage bag and dragged her to the river explains why there was blood at the point Mr. Beach described as the point of her death but then nowhere else until her body landed by the river where he said he threw her. The fact that Mr. Beach says that he threw the keys and tire iron and crescent wrench into the river and that those items were never found is not a flaw in the confession but a corroboration of it-- the Poplar River is a muddy murky water flow in which it is completely understandable that things can become embedded, either where they are dropped or miles later, and never found. There would have been a flaw in the verifiability of the statement had those items been found somewhere else-- but they never have been.

Even if an early morning call was made, from someone who admitted to drinking a great deal the night before to someone else who admitted drinking a great deal the night before, at the time suggested before Kimberly Nees' body was found by law enforcement, it would suggest that the body may have been discovered by some other party first but provides no evidence whatsoever that a different person than Mr. Beach murdered her. Another witness who also testified that he had had a great deal to drink, said that he had seen Kimberly Nees drive her pickup down to the train bridge area and that there were maybe five girls in the truck with her-- specifically that there was one girl sitting on another girl's lap. Now none of the proposed perpetrators left any fingerprints anywhere on the truck. Neither did Mr. Beach leave any fingerprints; however, when he was just sitting in the passenger side of the truck smoking marijuana and making an unwelcome sexual advance to Kimberly Nees, as he said, it is understandable that no prints were left. However, if girls were crammed into a truck cab together-- even sitting on each other's laps-- then it seems likely that they would have reached to stabilize themselves by holding onto the surfaces of the truck. Every print in the truck has been

compared against every person accused of involvement in this matter by Mr. Beach-- not one match was obtained. The witness involved said not only that he had been drinking a great deal on the night in question but stated that there was nothing special going on in Poplar that weekend besides the dance, when it was the rodeo weekend, which was a very major event indeed. Furthermore, his only explanation for not coming forward with this information in 28 years since the time of Kimberly Nees' murder was that no one from law enforcement had asked him; and when records were found that he had been questioned by a law enforcement officer a few days after the event about a different aspect of this murder investigation, which would have been an ideal time for him to bring up anything he knew, he simply denied that it had happened.

We were also intrigued by the observation of Mr. Racicot that, if there was a wild gang of jealous girls who killed Kimberly Nees as alleged by Mr. Beach, it would have been most unusual for them to inflict all of the wounds only on the top portion of the body; in a gang attack, it is much more typical for wounds to be inflicted all over the body as all of the assailants join in the aggression. The wounds in this murder, although inflicted with two weapons as explained in the confession, were confined in terms of the area on the body struck and were more typically reflective of a single assailant, certainly as compared with the gang theory as promulgated by Centurion Ministries for Mr. Beach.

There was a bloody towel found several blocks away from the crime scene. It contained some blood of someone never identified; it was a man's blood. It was not the blood of any of the people accused through Mr. Beach's representatives of committing the murder. There is no reason to think that the towel is connected with the murder in any way, and none was provided by Centurion Ministries.

Mr. Beach said in his confession that he had burned his clothes in a railroad car after the murder and before he walked home. The fact that, five years after the murder, the railroad was unable to confirm or deny or provide any information whatsoever on that issue does not call into question Mr.

Beach's guilt. The fact that he was wearing his underwear/swimming clothes again in the morning would again tend to underscore the reliability of the confession rather than undermine it.

The palm print on the side of the pickup is often discussed but has little probative value. The partial print is left in the blood of Kimberly Nees. It was a partial print and was smeared. Neither Kimberly Nees nor Barry Beach could be included or excluded as possibilities of those who may have left the print; neither could any of the people accused by Mr. Beach of committing the homicide instead of him. Kimberly Nees could have staggered against the pick up there while she was in the death throes and left the print. Barry Beach could have left the print as he was attacking Kimberly. Someone else could have discovered the body before law enforcement did and, having discovered the pool of blood left when Kimberly met her demise, walked up to the pickup, leaning on it while peering inside to see the grisly state of the cab in which Kimberly was first attacked. None of these possible scenarios makes less likely the culpability of Barry Beach for this murder.

There was discussion of footprints; but there is no reason to believe that the footprints are in any way connected with this murder. This was not virgin forest. This was a place frequented by many local people; that there were footprints and discarded beer cans on the ground before this murder took place was not a surprise. They have never been connected in any way with this murder. Again, none of the evidence or arguments presented makes any less likely the culpability of Barry Beach for this murder.

Mr. Kidd, the attorney who was retained on behalf of Mr. Beach after he had confessed to the Montana murder, according to law enforcement testimony and reports, met with Mr. Beach for an extensive period of time and then came forth with the information that Mr. Beach had confessed to the three Louisiana murders of which it was later demonstrated that he was not guilty. He also spoke of Mr. Beach having a split personality. We can only speculate on what factual scenario would have caused a competent defense attorney, only retained after a confession to murder had already been

obtained by law enforcement, well aware of the requirements of attorney-client privilege and therefore, presumably acting only after having advised Mr. Beach and obtaining his informed consent, to conduct himself thus; and it is not necessary for us to do so. He had suffered a stroke and made the long trip to Montana for our hearing. We observed his dedication to freeing Mr. Beach but simply did not find his testimony, in conflict with all of the law enforcement testimony and records, to be credible.

As to the confession, Mr. Beach asked us to believe, as he has asked others before, that the reason he made such a detailed confession was because the detectives who questioned him planted the details of the murder scene as they asked the questions; and he, exhausted from what he said was a much longer interrogation than the records show was actually conducted, sought only to please them and be returned to Montana so that he could "straighten things out." He testified as to threats made against him about the details of a grisly death by electrocution and a homosexual advance; both are denied by all law enforcement officials involved, and there is no reason to disbelieve their unanimous testimony. He complained that he had not been fed and was suffering from extreme hunger before he made his confession; he also suggested that his milkshake had been drugged while being fed before his confession which is his explanation for why he now says that, though he has never denied making the complete confession, he now says he cannot remember making his confession at all. It is clear that both of these complaints cannot simultaneously have merit, and it seems unlikely that the others do, either; it has come to be our belief that none of them does.

It is true that, in his suppression hearing, Mr. Moses kept his examination extremely tight, presumably in order to prevent any meaningful cross examination of Mr. Beach by Mr. Racicot. But never before this latest effort, long after the conviction and appeals, were these particular theories of the context of the confession advanced. Advancing them now does not constitute new evidence since, were they true, the defendant would have known that information at the time of the original trial. Nonetheless, we have considered them. From Louisiana, Detectives Via, Medaries and, by way of

MetNet, Sgt. Calhoun, each of whom had testified at the suppression hearing and had testified again at the trial-- and were obviously viewed as credible by both Judge Sorte and, separately, by the jury-- all returned to testify. It is our opinion, too, that the testimony of the detectives was more credible than that of Mr. Beach in every respect. In order to believe Mr. Beach's testimony, we would have to believe that every single one of the law enforcement officers was steadfast in lying at the time the confession was taken, through the suppression hearing, through another trip to Montana for the trial, and even now when most have changed careers and one faces a life-threatening health crisis. Mr. Beach's testimony before us is only further undermined by way of his extensive statement to his expert witness, Dr. Leo, made much more recently than his confession, but factually divergent from it in multiple significant respects (and divergent in some respects with his testimony before us as well)-- the detailed explanation of a clear memory of being "hooked up" to a lie detector machine, for instance, when the device they actually used had nothing to hook up at all. The statement to Dr. Leo is attached hereto as Appendix B.

The controversial exclusionary rule allows suppression from introduction into evidence at trial because a statement was taken inoptimally, unacceptably; it is a sanction imposed by courts against government run amuck. While the members of this Board actually think the exclusionary rule can be important indeed, they note that it was not imposed in this case. The Parole Board has no authority to do so after the fact; but that is really the crux of what is being requested by Centurion Ministries on behalf of Mr. Beach. The confession was not suppressed by Judge Sorte, and it was obviously believed by the jury. Our careful study and inquiry, into any new evidence of guilt or innocence, faces us with nothing within the statement that suggests innocence and much that demonstrates guilt.

Frankly, though Mr. Beach's counsel continues eloquently and vigorously to protest otherwise, the confession statement is compellingly self-authenticating within the confines of the document when compared with the crime scene. It seems that Mr. Beach's conflicting stories of how the confession

came about and why it should be ignored only serve ever-more-deeply to call Mr. Beach's credibility with regard to his denials into question rather than undermining the reliability of the confession provided to the detectives. Ultimately, his statement to detectives that he had gone home after the murder and tried to convince himself that he did not do it, chilling as it is, provides what seems to this Board the likeliest explanation of what he is doing still. The taped conversation in which he asks that he be allowed to tell his mother himself because she was going to take it hard, which was true and continues to be true, and which now he says he does not remember making either, leans, again, toward demonstrating the reliability of the statement and Mr. Beach's cognition at the time of making it rather than his lack thereof.

The sister of Mr. Beach, now alibi witness some three decades later, after not only the trial in which she says that Mr. Moses would not allow her to testify, but the various intervening legal efforts at freeing Mr. Beach at which new evidence could have been introduced, simply renders noncompelling the testimony. She is a sweet sister who clearly and understandably wants to see her brother freed; her testimony is in conflict with the testimony of the mother who did testify at the trial and was present throughout but did not testify at this hearing. Clearly, this is a family tragedy for the Beach family as well as the Nees family, presumably good and decent people all; but no action this Board or anyone else can ever take can possibly make it right for either family. This was a vicious, senseless murder; and its ramifications cannot be undone.

On the physical evidence in the locked room in Poplar, none was admitted to trial. Though problems with the testimony offered by Mr. Melnikoff in other cases has been called into question, he did not testify in this case. Although Mr. Racicot may have overstated the state of the scientific ability of the time by making the shorthand remark that the hair found belonged to Mr. Beach instead of saying that it shared every identifiable characteristic, which fine distinction was not objected to but could have been expected to be ferreted out by Mr. Moses in cross examination after the hair was

admitted, the jury was properly and thoroughly told and instructed to ignore any statements of counsel if they were not supported by testimony and physical evidence. We agree with Mr. Racicot's observation in our hearing that he does not think that the jury was influenced by his statement. thought by him at the time he made it to be accurate-- that the hair evidence would be introduced because he had not yet learned of the broken chain-- "Jurors are not morons." Not in closing but in rebuttal argument, Mr. Racicot only responded, and with circumspection which, in our view, rendered it far short of error, to the argument about the hair raised by Mr. Moses in his closing. More significantly, none of these arguments has caused a reversal in the several tribunals in which they have been raised before. And finally, since ours is not a court and need not be compelled completely by the rules of evidence, we can observe that, actually, it did appear that there was evidence that there was a pubic hair found on the victim's sweater, which shared every characteristic identifiable at the time with Mr. Beach. Our decision does not rest on the identification of the hair; but certainly there is no evidence regarding the hair which would point the finger of responsibility for this murder anywhere other than at Mr. Beach himself. The fact that the hair and certain other evidence was disposed of after trial is not sign of some great conspiracy to cover up a fact that Mr. Beach is innocent of the murder of Kimberly Nees. Indeed, in the 1980's, it was standard procedure to dispose of evidence after trials were completed and appeals were finished. So, too, with regard to the tapes: the tapes of the confession were destroyed in Louisiana, apparently as a result of some procedural system because it was an out-of-state case, but no intentional wrongdoing was demonstrated; there is no reason whatever to suspect that the certified transcript prepared and checked and testified to by Mr. Via was not accurate in every respect, and Mr. Beach provided none. Although it is regrettable not to have the tape recording (or a film of the murder itself, for that matter), the Board notes that murder confessions were taken long before recording equipment was even invented; and a transcript such as exists in this case would not then have been possible. Nothing about the destruction of the tapes calls into question Mr. Beach's

culpability for this crime. He has never denied making the confession; he just eventually, years after the fact, said that he did not remember making it and presented a variety of conflicting and noncompelling explanations.

We decline, also, to assign nefarious intent or frankly, significant ramifications to the entry into the makeshift evidence room. There was no evidence introduced or even discussed that there had been any notable disruption of any of the evidence; the reality appears to the contrary. The theory that a father in law enforcement, known but not produced at the hearing, who entered the room, not to go to the bathroom but to cover up a murder committed by his daughter, also not produced at the hearing, just has no traction-- the theory would be that a hair taken from Mr. Beach's pubic region was planted to throw law enforcement inquiries on a false trail? How could it have been obtained? If it was obtained to frame Mr. Beach, why didn't said law enforcement father focus harder on Mr. Beach long previous to his years-later confession in Louisiana? This whole non-issue seems just all smoke and mirrors signifying nothing.

Additionally, while somewhat gratuitous on our part, we want to state our observations with regard to allegations by Mr. Beach of prosecutorial misconduct by Mr. Racicot. We have read the trial transcript completely and find none. And with regard to Mr. Beach's accusations of inadequacy of the representation by Mr. Moses (even testifying to us that Mr. Moses had assured him that there was absolutely no way that he was going to be convicted and that, when Mr. Beach insisted on testifying in his own defense, Mr. Moses forbid" him from doing so; that in conflict with his description, in his statement to Dr. Leo, of the advice offered by Mr. Moses and further said by him to have been augmented by his mother), we have read the trial transcript completely and find no evidence whatsoever of inadequacy by Mr. Moses. Mr. Moses, in the 1980's, was an able defense attorney with a national reputation. In every criminal trial, an attorney must make a myriad judgments on when and why to object and make a record and when to let certain matters pass in order not to offend or frustrate

the jury; refraining from making certain of the ever-present and inescapable array of possible objections shows not inadequacy but strategy-- and multiple tribunals in this case have reviewed the transcript and judged it sufficient. Mr. Racicot was a fine and principled prosecutor, handling for many years, some of the most rigorous prosecutions in the State of Montana. Mr. Beach's trial was no less than a battle of titans.

No one is entitled to a perfect murder trial, but Mr. Beach had a very fine one. He has been afforded all of the rights of a citizen of the State of Montana and of the United States of America. His arguments have been heard and reheard. He has allowed his rights to languish and then has raised them in untimely fashion; the entire justice system has bent over backwards by our observation; his appeals and writs have been heard and considered exhaustively. There is no compelling argument that either his confession or his trial was improper in any way constituting a justification for the dramatic and drastic action of recommendation of a *de facto* reversal of his conviction by way of a recommendation for pardon issued by the Board of Pardons and Parole. And, frankly, his requirement of the rigors of an entire clemency hearing such as we have conducted, makes less compelling rather than moreso his argument that the sentence properly handed down by Judge Sorte, which he can only say was statistically unusual and, from his perspective, regrettable, should be reversed by the Governor.

The witnesses heard at the hearing on the matter of commutation each spoke either of how they had believed Mr. Beach innocent from the start or to the fact that they had met him in prison and found him to be a capital fellow. Many said that they had read the file compiled by Centurion Ministries and that they therefore had judged Mr. Beach innocent of the crime. We have great sympathy for that position.

On that note, we would like to inform Mr. Beach, his counsel, and the public about just how very open-minded were the members of this panel when first we began our inquiry into this matter. All three of us began our study by reading the complete files submitted by Centurion Ministries. All three

of us, initially taking the contents at face value, were alarmed that Montana may have an innocent man imprisoned wrongly all these years. It was from that posture and perspective that we proceeded to undertake our efforts in this matter. However, upon what then followed, an exhaustive inquiry and study, before, during and after the hearing, the facts simply did not unfurl as they were alleged and characterized in the Centurion Ministries claims. The multiple eye witnesses, the allegations of physical evidence of "the real killer" being ignored by law enforcement-- either crooked or inept-- did not materialize. We have great sympathy for those who read only the Centurion Ministries allegations and became alarmed, because that was our experience; but those allegations were not demonstrated as true even with the very wide latitude afforded Centurion Ministries-- the facts simply have not been demonstrated to be as representatives for Mr. Beach have alleged. Mr. Beach's culpability has been contested vigorously and eloquently, but we have found that contest to be lacking in substance.

Furthermore, it must be noted that Judge Sorte was duly elected by the people in the Fifteenth Judicial District; he was an experienced judge. He acted, after hearing all of the testimony put before the jury as well as all of the pretrial motions and in-chambers discussions, within his legislatively-circumscribed statutory authority in sentencing Mr. Beach. Then, the Sentence Review Division reviewed the matter and left the sentence intact, as did the Montana Supreme Court. Reversal of that sentence cannot now or ever be undertaken cavalierly by the Board. The standard for all categories of clemency, including commutation of sentence, is set forth in the statutes and regulations above. It is true that some who have committed murder have been sentenced to life with no prohibition against parole; it is also true that some who have committed murder not dissimilar to the murder of Kimberly Nees are given a death sentence. While it was true that Mr. Beach had not been convicted of a previous felony, it is also true that there had been a misdemeanor record and complaints about his violence prior to his arrest--certainly including even the day of the murder itself when, according to trial testimony, he completely lost control of his temper, attacked his own car from which the transmission had failed, and

told his companions that he was going back to town to send back a ride for them, which he admits he did not do, and get himself a woman or a girl. And, of course, Mr. Beach was under investigation for criminal wrongdoing in Louisiana when he made his confession of the Kimberly Nees murder. The discretion to sentence in our system, short of clemency, belongs to the trial judge fettered by the Sentence Review Division and the Montana Supreme Court. In order to remove the no parole requirement, more must be done than a simple re-thinking, a request for an approach from a different perspective, a statistical demonstration or calling upon a litany of people who have always been or have grown fond of the inmate in question or have come to believe he was wrongly convicted because of the rumors they have heard perhaps for decades but which have risen to fever pitch because of the "investigation" of Centurion Ministries. Certainly, more must be required than a showing of good or even exemplary behavior within the prison walls.

We also note that the view of Mr. Beach's behavior as exemplary is not a universal as evidenced by the letter of George Budd, Unit Manager at Montana State Prison, which, together with the letter of the mother of Kimberly Nees, lest the second hand testimony of the friend of Pam Nees be viewed as a united Nees family front, is attached hereto as Appendix C. In the Psychological Report prepared by Mark Mozer, PhD, at the prison, in preparation for our clemency consideration, having spoken with Mr. Beach about how his confession could possibly have occurred were he innocent as he claims to be, and said, very concisely: "Needless to say, there was a paranoid victim flavor to all of that, and one had the distinct sense that some pertinent details had been omitted." Indeed, so, too, it seems to us. It is also interesting to reflect on Mr. Beach's answer to a question posed by a member of the Board at his hearing as to whether, leaving aside whether he was guilty of the murder, he thought that his sentence, 100 years with no parole, was a fair sentence for a person who did commit that murder. He said that he thought it was fair. Furthermore, we do note the augmented danger posed by a man, despite his generally acceptable and in some ways commendable deportment within the prison walls, who

continues to make conflicting protestations of his own innocence despite all evidence to the contrary and has resisted taking responsibility and coming to grips with his wrongdoing despite the fact that proof of it beyond a reasonable doubt has been reviewed and found compelling by an nearly impossibly long list of well-qualified and conscientious public servants throughout the state and federal judicial systems. This Board will not recommend to the Governor that he tamper with Judge Sorte's sentence to extend any kind of commutation in this matter.

Therefore, the Board of Pardons and Parole declines to make a recommendation to the Governor for an order of Clemency for either Commutation or Pardon for Mr. Beach.

We may never be able to quell the rumors in Roosevelt County or to satisfy those who shout that justice has never been done here; we have worked hard and have come to the conclusion that justice was done almost three decades ago now. For purposes of the Parole Board, this matter has drawn to a close. This is not a DNA case, and it is almost impossible to envision a situation in which actual new evidence of the sort the statute requires could possibly be uncovered under these facts and circumstances. No further clemency hearings will be conducted, however, upon arguments that the whole story has never been told or nobody has ever heard Mr. Beach's side of the story as this one was. We heard the whole story; we heard Mr. Beach until he was finished. We read the whole file, considered the whole arguments of both sides and required that further interviews and examinations be conducted even though nearly three decades had elapsed since the time of Kimberly Nees' brutal murder. Representatives of the Attorney General's Office for the State of Montana, rather than simply saying, with what would have been some justification, that they ought not be required to engage in such after the fact goings-on, participated fully, complied fully, briefed fully. Mr. Beach will not be allowed another clemency hearing for pardon or commutation outside of the strict requirements of the statutes and regulations.

This is our justice system; Mr. Beach has been recipient of its fullest protections. A day

ultimately comes when matters are deemed settled; from our perspective, if never before. at last today is that day.

We are convinced. to the best of our abilities at discernment, that Mr. Beach was properly convicted and that each of the appellate stages through which he has progressed over the years also came to the correct decision. No proof of innocence, or newly discovered evidence of non-guilt or justification has been presented. Short of such a presentation, this unprecedented clemency hearing will not be repeated; from our perspective and to the best of our combined ability. we have laid this matter to rest.

Done and dated this 24th day of August, 2007.

Teresa McCann O'Connor
Board of Pardons and Parole Member
Beach Clemency Board Chair

Vance Curtiss
Board of Pardons and Parole Chair
Beach Clemency Board Member

Margaret Hall Bowman
Board of Pardons and Parole Member
Beach Clemency Board Member